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IN THE

Supreme Court of the United States

OCTOBER TERM, 1958

No. 686

IRVING TAITEL, RUTH TAITEL and JEROME TAITEL, d b a I. TAITEL & SON, a Partnership,
Petitioner,

v.

NATIONAL LABOR RELATIONS BOARD,
Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

REPLY BRIEF OF PETITIONER

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CITATIONS

Cases

Frank Bros. Co. v. N.L.R.B. (1944), 321 U. S. 702, 704 4

H. J. Heinz v. N.L.R.B. (1941), 311 U. S. 514, 521 3

N.L.R.B. v. Bird Machine Co. (1947), 161 F. 2d 586, 591 ..... 2, 4

N.L.R.B. v. Bradley Washfountain Co. (1951), 192 F. 2d 144, 153 4

North Carolina Finishing Co. v. N.L.R.B. (1943), 133 F. 2d 714, 716 3

Statute

Labor Management Relations Act, 61 Stat. 136, 28 U. S. C. 151, *et seq.* 1

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ARGUMENT

In its Brief, the Board reviews all of the interference in violation of Sec. 8(a)1 of the L. M. R. A. charged against the petitioner. Except for the two incidents in which the plant manager tried to persuade the employees to return to work, and the alleged incident about the sign, all occurred within three days before March 17, 1956, the day when the union and the employer met,

prays this Court grant rehearing of its order of March 23, 1959, denying the petition for writ of certiorari, and that a writ of certiorari issue to review the judgment of the Court of Appeals for the Seventh Circuit, in the above entitled case as prayed for in the petition filed, January 28, 1959, herein.

REASONS FOR GRANTING REHEARING AND ISSUING THE WRIT

The petitioner believes that the question of "due process" raised below needs clarification, as it was considered most briefly in the petition: (*Hickman v. Taylor*, 327 U. S. 808, 328 U. S. 876, 329 U. S. 495.) The petitioner's contention was that a substantial part of the evidence was ignored and disregarded by the tribunals below, and this failure to consider the very important evidence denied the petitioner "due process." It was conceded that if the tribunals had weighed the evidence of the petitioner's disavowal and its promise not to engage in reprisal, if the employees joined the union or engaged in union activity, and found it evasive, or untimely or ineffective, supposing the evidence had supported such conclusions, the petitioner would have no grounds to claim a denial of due process, since the evidence had been heard, considered and weighed. The comment of the New York Supreme Court in *New York State Labor Relations Board v. Greif Realty Corp.* (1947), 70 N. Y. S. 2d 288, at p. 293, seems most pertinent, where it said:

> "Findings of fact in support of decisions by courts and administrative bodies alike serve to give assurance to parties concerned that the decisions are based upon evidence of record and were not reached arbitrarily or influenced by extra-legal considerations."

Although the decision was later reversed, this statement is basic. Obviously, if the evidence is heard, but is not considered and weighed, the fact that it was heard means nothing, as its presence in the testimony has not entered into the judgment and decision.

In *Donnelly Garment Co. v. N.L.R.B.* (1945), 151 F. 2d 854, where the respondent had been charged with sponsoring an inside union, and the respondent sought to introduce evidence that the union had been independently formed, the Board had refused to admit such evidence, and on the second hearing ordered by the Court of Appeals for the 8th Circuit, had indicated that the evidence was immaterial and worthless. The Court of Appeals said at page 872:

> "It is our understanding that, when an employer is charged with an unfair labor practice which he denies having committed, the Constitution of the United States guarantees him a fair trial of the issue; that one of the requirements of a fair trial is that any evidence which is competent and material shall be received and considered, and that the strength of the testimony against him has no bearing upon the admissibility of his testimony or his right fully to present his defense."

In this case the Board and the court below had not even bothered to reject the evidence, but had ignored it. The Court of Appeals said further in the above case at page 875:

> "We think that it would be inappropriate to consider the adequacy of the evidentiary basis for the Board's order at this time and upon this record. We have no right to assume that if the Board had received and considered all of the competent and material evidence proffered by the Company and the plant union, it

> would have made the same findings and order. We cannot avoid the conclusion that, in the absence of the rejected testimony, the record presents an incomplete picture."

That is the present situation, for the Trial Examiner's Report "presents an incomplete picture" since there is no consideration and determination of a substantial part of the evidence, the disavowal. The Court refers to receiving evidence and its being "considered," in both of the above quotations indicating that a fair trial requires that the evidence be both received and considered. The petitioner's position so far as the lower tribunals are concerned is the same as if the evidence was never admitted, or certainly as if it had been rejected without any consideration.

In the New York Supreme Court case above quoted, *New York State Labor Board v. Greif Realty Corp.* (1947), 76 N. Y. S. 2d. 288, where the Board had refused to read the evidence, the court also said at p. 293:

> "The decisions are replete with language supporting the view that the findings of an administrative body must have support in the evidence; yet, if the Board itself, in making such findings, failed to read the evidence, it must follow that the conclusion arrived at was arbitrary, . . ."

In *N.L.R.B. v. Pittsburgh Steamship Co.* (1949), 337 U. S. 656, where the respondent claimed bias and improper conduct by the Trial Examiner because all of the Board testimony was credited, and all of the respondent's testimony was discredited, this Court said, at pp. 659-660:

> "Thus in the determination of litigated facts, the testimony of one who has been found unreliable as to one issue may properly be accorded little weight as to

the next. Accordingly, total rejection of an opposed view cannot of itself impugn the integrity or incompetence of a trier of fact. The gist of the matter has been put well by the Court of Appeals for the 5th Circuit, speaking through Judge Hutcheson, in granting enforcement of an NLRB order; 'The fact alone . . . of which respondent makes so much, that Examiner and Board uniformly credited the Board's witnesses and as uniformly discredited those of the respondent, though the Board's witnesses were few and the respondent's witnesses were many, would not furnish a basis for a finding by us that such a bias or partiality existed and therefore the hearings were unfair. Unless the credited evidence . . . carries its own death wound, that is, is incredible and therefore, cannot in law, be credited, and the discredited evidence . . . carries its own irrefutable truth, that is, is of such nature that it cannot in law be discredited, we cannot determine that to credit the one and discredit the other is evidence of bias.'"

In our present case, the petitioner disavowed any threats of interference and promised not to impose reprisal upon those who joined the union if the union won. This disavowal was first made at the meeting of the petitioner and the union on March 17, 1956. The petitioner reduced its disavowal to writing and had it printed in the local newspapers in their next editions. It was proclaimed for a three days after the first alleged interference, and was published in the next issues, and was distributed to the employees. At no time was this disavowal attacked as meaning anything other than what it said, either by the General Counsel or the union, yet the tribunals below did not mention this disavowal. This published disavowal was received into evidence, and its existence was indirectly acknowledged by the Trial Examiner, in referring to another part of the published statement. Therefore, this

evidence, which was given by the petitioner carried "its own irrefutable truth," and as this Court said, it corrected "the impression of the employees that support of the union was not favored by the petitioner and would result in reprisals." Since neither the Trial Examiner nor the Board questioned its authenticity or its character in any way, and consequently, being evidence bearing "its own irrefutable truth," the Trial Examiner and the Board could not reject it for what it was, a disavowal and a promise not to engage in reprisals.

In *N.L.R.B. v. Pittsburgh Steamship Co.* (1949), 337 U. S. 656, quoted above, this Court has indicated the value of such evidence, which has not been attacked. Paraphrasing the last sentence above, we find this Court's purpose is most pertinent here.

"Since the discredited evidence (ignored evidence) carries its own irrefutable truth (as this does), that is, is of such nature that it cannot in law be discredited (as is the present case), we cannot fail to determine that to credit the one and discredit the other is an evidence of bias." That is, the petitioner was denied "due process."

We should also note what this Court said with regard to what constitutes a "hearing" in order to assure the parties "due process." In *Morgan v. U. S.* (1936), 298 U. S. 468, this Court said, at pages 480-1:

> "The requirement of a 'full hearing' has obvious reference to the tradition of judicial proceedings in which evidence is received and weighed by the trier of the facts. The 'hearing' is designed to afford the safeguard that the one who decides shall be bound in good conscience to consider the evidence, to be guided by that alone, and to reach his conclusion uninfluenced by extraneous considerations which in other fields might have play in determining purely executive action."

This the petitioner believes was denied it, by the failure of the Trial Examiner, the Board and the lower court to consider the evidence. This Court continued:

> "If the one who determines the facts which underlie the order has not considered evidence or argument, it is manifest that the hearing has not been given."

In other words, the petitioner has been denied "due process" in the order against it.

We feel that the final quotation in the petition for writ of certiorari should be repeated here, from *In re American Rio Grande Land & Irrigation Co.* (1937), 21 F. Supp. 492, 495, where the federal district court in Texas said:

> "'Due process' . . . includes and means an opportunity to be heard and a resultant action in conformity with the truth deduced at such hearing.'"

In the present state of the evidence, the truth is that the petitioner published its disavowal for the benefit of all the employees. Therefore due process means a resultant action in conformity with the fact of disavowal, which this Court declared in *H. J. Heinz v. N.L.R.B.* (1941), 311 U. S. 514, 521, to require such disavowal lest the employer be bound by such interference. Since there was no resultant action in conformity with the truth of disavowal, the petitioner has been denied "due process" of law, under the Fifth Amendment, and its rights violated.

CONCLUSION

For the reasons set forth above and in the petition for writ of certiorari, it is respectfully urged that the rehearing be granted and that upon such rehearing, a writ of

certiorari issue to the Court of Appeals for the Seventh Circuit.

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April 2, 1959.

CERTIFICATE OF SERVICE

I, Thomas M. Quinn (below signed), one of the attorneys for I. Taitel & Son, petitioner herein, and a member of the Bar of the Supreme Court of the United States, hereby certify that the foregoing petition for rehearing is presented in good faith and not for delay and is restricted to grounds specified in Rule 58 of the rules of this Court, and I hereby certify that on April 2, 1959, I served a copy of the foregoing Petition for Rehearing of Order Denying Petition for Writ of Certiorari on the respondent, by mailing first class mail addressed to counsel, J. Lee Rankin, Solicitor General of the United States, Department of Justice, Washington 25, D. C., and the General Counsel, National Labor Relations Board, Washington 25, D. C.

Thomas M. Quinn.